

E-FILED ON 8/25/06

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL PEKIN and AMANDA
HERNANDEZ,

No. C05-05402 HRL

Plaintiffs,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

v.

COUNTY OF SAN BENITO and DOES 1-10,
inclusive,

[Re: Docket No. 24]

Defendants.

Defendant County of San Benito ("County") moves to dismiss the First Amended Complaint. Plaintiffs Michael Pekin and Amanda Hernandez oppose the motion. Upon consideration of the papers filed by the parties, as well as the arguments presented at the July 18, 2006 hearing, this court GRANTS the motion IN PART and DENIES the motion IN PART.¹

I. BACKGROUND

Plaintiff Michael Pekin is an attorney and a member of the California bar. Plaintiff Amanda Hernandez is now an attorney; however, during the time period encompassed by plaintiffs' complaint, she was a law school graduate who worked as a paralegal in Pekin's office. On December 29, 2005, they brought this civil rights action under 42 U.S.C. § 1983, seeking money damages and claiming that the County retaliated against them for exercising

¹ Pursuant to 28 U.S.C. § 636(c) and Fed.R.Civ.P. 73, all parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned.

1 their claimed First Amendment right to “represent their clients.” The County moved to dismiss
2 the complaint under Fed.R.Civ.P. 12(b)(6) on the grounds that the complaint failed to properly
3 assert a Monell² claim and did not allege facts establishing the violation of any constitutional
4 right. This court concluded that, under liberal federal pleading standards, the complaint
5 sufficiently alleged municipal liability under section 1983. It nevertheless agreed that attorneys
6 have no personal right under the First Amendment to simply “represent their clients,” and it
7 followed, neither did paralegals. Accordingly, the complaint was dismissed with leave to
8 amend.

9 In their First Amended Complaint (“FAC”), plaintiffs again assert claims for retaliation
10 for the exercise of their First Amendment rights, as well as for conspiracy to deprive them of
11 their constitutional rights under the First, Fourth and Fourteenth Amendments.³ For purposes of
12 a Fed.R.Civ.P. 12(b)(6) dismissal, the factual allegations of plaintiffs’ FAC are assumed to be
13 true. The FAC alleges as follows:

14 Since mid-2003, Pekin became concerned about what he perceived to be government
15 corruption in San Benito County – namely, that Richard Scagliotti (then a member of the
16 County Board of Supervisors) used his political office for personal financial gain and to harm
17 his business competitors. Local business people allegedly also shared Pekin’s concerns, but
18 feared retaliation if they spoke out. Around mid-2003, a “citizen’s group fighting corruption”
19 began meeting secretly to discuss these concerns. (FAC at p. 6:12). With money contributed
20 by the group, Pekin hired a private investigator, David Henderson, to look into the suspected
21 corruption. Henderson later prepared a report which Pekin says confirmed his suspicions.

22 The FAC further alleges that by October 13, 2003, Pekin was convinced that litigation
23 was the only means available to the group to fight against the corruption; but the group
24 purportedly was unable to find any attorney willing to represent it in court because of a fear of
25

26 ² Monell v. Dep’t of Social Servs., 436 U.S. 658 (1978).

27 ³ The FAC also included a claim for malicious prosecution. However,
28 plaintiffs have withdrawn that claim as premature because the action upon which the claim is
based is currently on appeal. Accordingly, the County’s motion to dismiss as to that claim is
denied as moot.

1 retaliation. Wanting to publicly expose the alleged government corruption, two members of the
2 group (identified only by the pseudonyms “Benito Juarez” and “Pipila Guanajuato Guerrero”)
3 urged Pekin to file a motion to intervene in a lawsuit then pending against the County in the
4 state Superior Court, McGovern v. San Benito County, Case No. CV 03-00103 (“McGovern
5 Action”). To protect the identities of the citizens in the group, Pekin dubbed them “Los
6 Valientes”; and, on October 14, 2003, he filed a motion on the group’s behalf to intervene in the
7 McGovern Action. That motion was denied.

8 In December 2003, Pekin filed a taxpayer lawsuit on behalf of Juan Monteon against the
9 County and Scagliotti entitled Monteon v. Scagliotti, Case No. CU 03-00150 (“Monteon
10 Action”). That action is still pending in the San Benito County Superior Court. According to
11 the FAC, the Monteon complaint asserts many of the same allegations of corruption as those
12 made by Los Valientes in their unsuccessful motion to intervene in the McGovern Action.

13 Meanwhile, plaintiff Hernandez graduated from law school in June 2003, passed the
14 California bar exam that same summer, but was not “sworn in” to the bar that year. After
15 completing a one-year, out-of-state clerkship, she returned to California in October 2004 and
16 began working for Pekin as a paralegal. Plaintiffs allege that from the moment she began
17 assisting Pekin in his “anti-corruption litigation,” she “publicly and personally ascribed to the
18 same concerns, beliefs, and political activities of Pekin designed to carry out the goals of
19 fighting corruption of Supervisor Scagliotti and San Benito County.” (FAC at 3:26-4:2). Both
20 plaintiffs claim that they also “dispersed copies of the Henderson report and findings from the
21 report as widely as circumstances permitted in an effort to create and maintain a publicly
22 supported citizen’s group to fight the . . . corruption . . .” (*Id.* at 4:13-15).

23 The FAC further alleges that on December 17, 2004, the County District Attorney filed
24 a civil lawsuit against “‘Los Valientes,’ Pekin and Hernandez, along with Pekin’s son (an
25 attorney who also worked in the office)” for unfair business practices. (FAC at 10:16-18). That
26 lawsuit, which allegedly pertains to the filing of the intervention motion in the McGovern
27 Action and plaintiffs’ conduct in the Monteon Action, is still pending.
28

1 On February 22, 2005, the County District Attorney filed criminal charges against
2 Pekin, based on a Grand Jury indictment, for activities allegedly arising out of his participation
3 in the McGovern and Monteon Actions. The charges included: (1) Conspiracy to Falsely Move
4 or Maintain Any Suit, Action, or Proceeding; (2) Conspiracy to Obstruct Justice or the Due
5 Administration of the Laws; (3) Preparing False Documentary Evidence; (4) Attempted
6 Subornation of Perjury; and (5) Attempting to Deceive the Court or Another Party to a Lawsuit.
7 All of the criminal charges were later dismissed on June 20, 2005.

8 On April 26, 2005, the County District Attorney filed a single misdemeanor charge
9 against Hernandez for the unlicensed practice of law. The charge, which allegedly arose out of
10 her participation in the Monteon Action, was dismissed by the state court on September 1, 2005.

11 In the instant lawsuit, plaintiffs claim that the County engaged in a campaign of
12 harassment by encouraging the County's District Attorney to file criminal and civil actions
13 against them in retaliation for the exercise of their First Amendment rights "to access the courts
14 and petition the government for redress of grievances, and exercise of freedom of speech, and
15 freedom of association." (FAC at 10:24-25). Plaintiffs claim that they "have been harmed in
16 that [they] have incurred attorneys' fees, suffered humiliation, mental anguish, and emotional
17 and physical distress." (*Id.* at 11:2-3).

18 Pursuant to Fed. R. Civ.P. 12(b)(6), the County now moves to dismiss the FAC for
19 failure to state a claim upon which relief can be granted. It argues that the FAC still fails to
20 allege any facts demonstrating the violation of any constitutional rights. Alternatively, it moves
21 for an order directing plaintiffs to provide a more definite statement pursuant to Fed.R.Civ.P.
22 12(e) or striking portions of the complaint under Fed.R.Civ.P. 12(f).

23 II. LEGAL STANDARD

24 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests
25 the legal sufficiency of the claims in the complaint. In such a motion, all material allegations in
26 the complaint must be taken as true and construed in the light most favorable to the claimant.
27 See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). "However, the court
28 is not required to accept legal conclusions cast in the form of factual allegations if those

conclusions cannot reasonably be drawn from the facts alleged.” Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). Dismissal is appropriate only when it “‘appears beyond doubt that the plaintiff can prove no set of facts in support his claim which would entitle him to relief.’” Balistreri, 901 F.2d at 699 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Ordinarily, a court may only look at the face of the complaint and documents attached to the complaint in deciding a Fed. R. Civ. P. 12(b)(6) motion to dismiss. See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, documents which are properly subject to judicial notice may be considered without converting the motion into one for summary judgment. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).⁴

III. DISCUSSION

A. Claim for Retaliation Under the First Amendment

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda County, 811 F.2d 1243, 1245 (9th Cir. 1987).

Retaliation, though it is not expressly referred to in the Constitution, is actionable because retaliatory actions may tend to chill individuals’ exercise of constitutional rights. See Perry v. Sindermann, 408 U.S. 593, 597 (1972). A claim under § 1983 for retaliation under the First Amendment may be stated where a plaintiff alleges retaliation by state actors for the exercise of his First Amendment rights. See Mt. Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 283-84 (1977). The plaintiff must show that the type of activity he was engaged in was protected by the First Amendment and that the protected conduct was a substantial or motivating factor for the alleged retaliatory acts. See id. at 287. Retaliation by a state actor for the exercise of a constitutional right is actionable under 42 U.S.C. § 1983, even if the act, when

⁴ The County’s requests for judicial notice of records from the Monteon Action and the McGovern Action are granted insofar as they appear to present undisputed matters of public record which are relevant to the issues presently under consideration. FED.R.EVID. 201.

1 taken for different reasons, would have been proper. See id. at 283-84. A plaintiff need not
2 demonstrate that his speech actually was inhibited or suppressed, however. The proper inquiry
3 is whether the official's acts would chill or silence a person of ordinary firmness from future
4 First Amendment activities. See Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283,
5 1300 (9th Cir. 1999).

6 In the instant case, the County contends that the FAC fails to allege facts demonstrating
7 that plaintiffs were engaged in any constitutionally protected activities. Here, it asserts that,
8 under the guise of "Los Valientes," plaintiffs are merely re-asserting a right to simply
9 "represent their clients" – a claim that has already been rejected by this court. For their part,
10 plaintiffs argue that the FAC alleges facts demonstrating that their participation – either as
11 litigants or as attorneys – in the underlying state court actions is encompassed by rights of
12 expression and association under the First Amendment.

13 The FAC does not allege any facts demonstrating that plaintiffs were litigants in the
14 underlying state court lawsuits, nor have plaintiffs shown that they could amend their complaint
15 to allege any such facts. Neither plaintiff is identified as a party to the McGovern or Monteon
16 Actions. To the contrary, the FAC indicates that the motion to intervene in the McGovern
17 Action was filed on behalf of Los Valientes and that the Monteon Action was filed on behalf of
18 Juan Monteon. Moreover, as plaintiffs' counsel acknowledged at oral argument, the FAC
19 alleges that both the motion to intervene and the Monteon Action were filed while plaintiff
20 Hernandez was out-of-state and approximately one year before she even began working for
21 Pekin. (See FAC at 3:19-23, 6:1-3, 7:14-19). Further, the County says that Pekin cannot be a
22 member of the group because, according to his own court filings in the McGovern Action, Los
23 Valientes is comprised of San Benito County citizens, whereas the FAC acknowledges that
24 Pekin is not a County resident. (See Serverian Reply Decl., Ex. A at p. 3; FAC at 7:7-10).

25 Plaintiffs nevertheless argue that their participation in the underlying state court
26 litigation constitutes an exercise of their First Amendment political expression and association
27 rights under NAACP v. Button, 371 U.S. 415 (1963) and its progeny. As discussed in this
28 court's order granting the County's prior motion to dismiss, those cases recognize that

1 collective activity undertaken to obtain meaningful access to the courts is a form of political
2 expression and association protected by the First Amendment. See NAACP v. Button, 371 U.S.
3 415 (1963); see also In re Primus, 436 U.S. 412 (1978); First Defense Legal Aid v. City of
4 Chicago, 209 F. Supp.2d 935 (N.D. Ill. 2002).

5 The County argues that the collective activity concerns at issue in the Button line of
6 cases are not implicated here because (1) Los Valientes is not comprised of socially
7 marginalized citizens; (2) judicial relief is not sought on Los Valientes' behalf in any event –
8 either in the instant action or in the Monteon Action; and (3) there is no “group” because
9 plaintiffs and Pekin's son claim to be the only publicly known members of Los Valientes. As
10 such, the County argues that dismissal is warranted because this court has already ruled that
11 plaintiffs have no personal right to simply “represent their clients” in court. See, e.g., Mezibov
12 v. Allen, 411 F.3d 712 (6th Cir. 2005) (concluding that an attorney did not engage in free
13 expression protected by the First Amendment when he filed motions and raised defenses in
14 court, and holding, as a matter of first impression, that an attorney retains no personal First
15 Amendment rights when representing his client in courtroom proceedings); Hinds v. Dallas
16 Independent School Dist., 188 F. Supp.2d 664 (N.D. Tex. 2002) (concluding that defendants'
17 allegedly retaliatory lawsuit did not infringe the attorney-plaintiff's First Amendment rights of
18 free speech or access to the courts, notwithstanding that the attorney filed the litigation to
19 express his own personal views).

20 The instant case does not fall squarely within the cases cited by either party. On the one
21 hand, the allegations of the FAC indicate that, unlike the NAACP or the ACLU, Los Valientes
22 is a rather loosely organized group of County citizens. Moreover, unlike Button and Primus,
23 the FAC indicates that “Los Valientes” was not and is not involved in the Monteon Action, and
24 the group's effort to intervene in the McGovern Action failed only because its motion was
25 denied by the court. (See FAC at 6:1-3, 7:14-16). Indeed, if these were the only allegations in
26 the FAC, defendant's motion to dismiss might indeed be well taken.

27 On the other hand, unlike those cases which rejected an attorney's First Amendment
28 right to simply represent clients, here, the FAC does contain allegations which – broadly

1 construed under liberal federal pleading rules – support plaintiffs’ contention that they were
2 punished for their activities as members or supporters of Los Valientes.⁵ This court is
3 unpersuaded that a group must be comprised of socially marginalized citizens before its rights
4 of association and expression will be recognized (as the County seems to suggest). Although
5 the allegations of the FAC are not a model of clarity, at this stage of the litigation the court
6 views the allegations in the light most favorable to plaintiffs. Here, the FAC alleges that
7 County officials conducted a “campaign to retaliate against Pekin and Hernandez for their
8 creation of and participation in ‘Los Valientes.’” (FAC at 8:2-3). As discussed above, it is
9 unclear that Los Valientes has any connection with the Monteon Action under the facts as pled.
10 Nevertheless, for purposes of resolving the instant motion, the court finds that plaintiffs’ claims
11 that they are being unjustifiably punished for activities connected with the group are supported
12 by the allegation suggesting (albeit in very vague fashion) that the County’s civil suit was
13 brought against “Los Valientes.” (See FAC at 10:16-18). While the County contends, in
14 essence, that there is no “group” because its known membership is essentially limited to
15 Hernandez and Pekin’s son, the FAC contains allegations indicating that there are a number of
16 other (albeit currently anonymous) members of Los Valientes. (See *id.* at 4:22-23, 5:3-4; 6:26-
17 7:3). Whether plaintiffs will succeed in establishing their claims remains to be seen. Taking
18 these allegations as true (as is required on the instant motion), this court concludes that
19 dismissal is not appropriate as to plaintiffs’ claims for retaliation in violation of their claimed
20 First Amendment rights to freedom of expression and association.

21 The County argues that the FAC nevertheless is deficient because it does not contain
22 specific allegations that plaintiffs’ activities were actually suppressed or that a person of
23 ordinary firmness would have been chilled by the alleged retaliatory conduct. However, as
24 noted above, and as the County acknowledges in its own moving papers, plaintiffs are not
25 obliged to show that their activities were in fact suppressed to state a claim for retaliation. See

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28 ⁵ The FAC is a departure from the original complaint, which merely alleged
that plaintiffs litigated the Monteon Action on behalf of a client.

1 Mendocino Env'tl. Ctr. v. Mendocino County, 192 F.3d at 1300. In any event, the court finds
2 that the complaint meets the liberal federal notice pleading standards under Fed.R.Civ.P. 8.

3 However, the court agrees that plaintiffs have not, and cannot, allege facts
4 demonstrating any violation of an underlying First Amendment right of access or petition. The
5 Ninth Circuit apparently has not resolved whether it is unconstitutional to retaliate against an
6 individual who already has fully accessed the courts. See Lytle v. Wondrash, 182 F.3d 1083,
7 1087, 1089 (9th Cir. 1999) (granting qualified immunity on question whether retaliation which
8 occurred after the plaintiff filed a complaint, litigated her claim, and won her case was
9 unconstitutional). However, it seems that to state a claim based on a denial of access to the
10 courts, plaintiffs must allege facts demonstrating that they suffered an actual injury by being
11 shut out of court. See Christopher v. Harbury, 536 U.S. 403, 415 (2002). Here, plaintiffs have
12 not alleged that they were precluded from litigating their views in court or from expressing their
13 views elsewhere. Nor have they alleged any facts indicating that they were otherwise barred by
14 virtue of any County action. Indeed, the FAC indicates that they continue to prosecute the
15 Monteon Action and that they were unable to proceed in the McGovern Action only because the
16 motion to intervene was denied. (See FAC 6:1; 7:20).

17 **B. Plaintiffs' Conspiracy Claim**

18 The FAC alleges that the County conspired with county officials and others to deprive
19 plaintiffs of their rights under the First, Fourth and Fourteenth Amendments. As discussed
20 above, the court finds that plaintiffs have, under liberal pleading standards, sufficiently alleged
21 a claim for violation of their claimed First Amendment rights of expression and association.
22 Accordingly, their conspiracy claim survives insofar as it is based upon the alleged violation of
23 these claimed rights.

24 However, the court agrees that plaintiffs have not alleged any facts demonstrating a
25 violation of their Fourth and Fourteenth Amendment rights. Nor is it apparent that such claims
26 could be asserted by amendment. Accordingly, the County's motion to dismiss is granted
27 without leave to amend as to plaintiffs' conspiracy claim to the extent that plaintiffs claim a
28 violation of their rights under the Fourth and Fourteenth Amendments.

C. The County's Alternate Motions Under Fed.R.Civ.P. 12(e) and 12(f)

The County alternatively moves for an order compelling plaintiffs to provide a more definite statement pursuant to Fed.R.Civ.P. 12(e) or for an order striking portions of the complaint pursuant to Fed.R.Civ.P. 12(f). Where a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." FED.R.CIV.P. 12(e). Such a motion "shall point out the defects complained of and the details desired." *Id.* In addition, the court may strike "from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter." FED.R.CIV.P. 12(f).

Here, the County argues that the FAC is obscure in that it is unable to distinguish Hernandez's claims from those of Pekin. Indeed, plaintiffs' counsel readily acknowledged at oral argument that the underlying allegations are convoluted. Nevertheless, the court concludes that the complaint satisfies liberal federal notice pleading standards under Fed.R.Civ.P. 8. The parties will have an opportunity in discovery to seek further detail or clarification as to the allegations. Accordingly, the County's alternate motions under Fed.R.Civ.P 12(e) and 12(f) are denied.

IV. ORDER

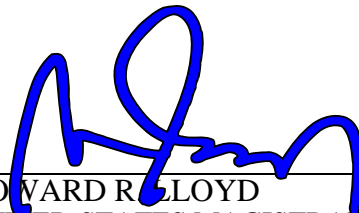
Based on the foregoing, IT IS ORDERED THAT the County's motion to dismiss is GRANTED IN PART AND DENIED IN PART as follows:

1. With respect to plaintiffs' claim for relief for retaliation, the County's motion is DENIED insofar as plaintiffs claim a violation of their rights to freedom of expression and association. The motion is GRANTED to the extent plaintiffs claim a violation of their First Amendment rights of access or petition.

2. With respect to plaintiffs' claim for conspiracy, the County's motion is DENIED to the extent plaintiffs' claim is based upon the alleged deprivation of their First Amendment rights of expression and association. The motion is GRANTED to the extent plaintiffs claim a violation of their rights under the Fourth and Fourteenth Amendments.

3. The County's alternate motions under Fed. R. Civ. P. 12(e) and Fed. R. Civ. P. 12(f) are DENIED.

Dated: August 25, 2006



HOWARD R. LOYD
UNITED STATES MAGISTRATE JUDGE

5:05-cv-5402 Notice will be electronically mailed to:

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